*Gregurke v The Queen* [2014] NTCCA 11

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| PARTIES: | **GREGURKE, Michelle** |
| | v |
| | **THE QUEEN** |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 2 of 2014 (21247972) |
| DELIVERED: | 14 August 2014 |
| HEARING DATES: | 8 August 2014 |
| JUDGMENT OF: | RILEY CJ, BARR and HILEY JJ |
| APPEALED FROM: | OLSSON AJ |

**CATCHWORDS:**

*R v Bird* (1988) 56 NTR 17, applied.

*Liddy v R* (2005) NTCCA 4; *Bishop v The Queen* [1997] NTCCA 105, referred to.

*Criminal Code 1983* (NT), 210(2).
*Sentencing Act 1995* (NT).

**REPRESENTATION:**

*Counsel:*

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| Appellant: | R Goldflam |
| Respondent: | R Griffith |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | C |
| Number of pages: | 13 |

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Gregurke v The Queen* [2014] NTCCA 11
No. CA 2 of 2014
(21247972)

BETWEEN:

**MICHELLE GREGURKE**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: RILEY CJ, BARR and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 14 August 2014)

**Riley CJ and Barr J:**

[1] On 13 December 2013, the appellant pleaded guilty to having stolen $124,300 in cash from her elderly victim, in relation to whom she provided home care in Alice Springs. The appellant was sentenced to imprisonment for six years with a non-parole period of four years.

[2] On 17 March 2014, a judge of this Court granted the appellant an extension of time within which to seek leave to appeal but refused leave. Thereafter the appellant referred the application for leave to appeal to be considered and determined by the Court of Criminal Appeal.

[3] The proposed grounds of appeal are:

(a) that the sentence was manifestly excessive;

(b) the sentencing judge failed to attribute sufficient weight to the appellant's personal history and the impact of this history on the appellant's mental health and her moral culpability;

(c) the sentencing judge erred in failing to give sufficient weight to the appellant's remorse; and

(d) the sentencing judge erred in failing to give sufficient weight to the appellant's good prospects for rehabilitation.

**The offending**

[4] The victim was between 88 and 89 years of age at the time of the offending. She died on 22 May 2010 at the age of 89 years. From 2008 to 23 January 2010, she received home care assistance for the aged provided by Calvary Silver Circle Carers. The victim had suffered a broken hip and was frail and largely immobile. She relied upon carers from Calvary to attend to her grocery shopping, buy medicine and pay her bills. She kept her life savings in a bank account which could be accessed through a bankcard. The bankcard required the use of her personal identification number or PIN.

[5] The appellant commenced employment with Calvary and, on 22 September 2008, was assigned as a carer for the victim. She also provided care to a number of other persons.

[6] The appellant took responsibility for grocery shopping, buying medicines and paying bills on behalf of the victim and was provided with the bankcard and the relevant PIN for that purpose. Between 12 December 2008 and 2 February 2010, the appellant used the bankcard and the PIN to make unauthorised cash withdrawals from the account of the victim. Between 12 December 2008 and 5 August 2009, she made 56 such withdrawals in Alice Springs. On 7 August 2009, she made one withdrawal in Katherine. On 10 August 2009, she made a withdrawal in Darwin. On 17 August 2009, she made a withdrawal in Palmerston. Between 17 August 2009 and 2 February 2010, she made a further 75 withdrawals in Alice Springs. In total, she made 134 separate unauthorised cash withdrawals of the victim's money from the account. The withdrawals were mostly for amounts between $800 and $1000. The total amount stolen was $124,300 which reduced the victim's bank account to about $4000.

[7] On 22 January 2010, the appellant ceased working for the victim and, soon thereafter, returned the bankcard to Calvary Silver Circle Carers. She then relocated to South Australia. At about the same time, the victim was accepted to live at the Old Timers Village in Alice Springs and no longer required the services of Calvary.

[8] The appellant was interviewed by Police in South Australia in February 2013 and, during the course of the interview, said:

> I am guilty of taking the money out of her account. I have a gambling problem. I withdrew it from Yeperenye and Casino.

[9] All the stolen money was used for the benefit of the appellant. Most of it was lost in gambling. None of the money has been recovered. The amount stolen constituted all but a small amount of the victim's savings. Whilst the sentencing judge observed that "it is said her health declined immediately after the discovery and that she simply lost the will to live", his Honour did not make any specific finding as to a link between her declining health and the offence. It is apparent that his Honour proceeded to sentence on the basis that the offending had a significant impact upon the victim.

[10] At the time of sentencing, the appellant was aged 43 years. She had no prior record of offending. The appellant's parents separated when she was about five years of age. Her mother remarried and the family led an itinerant lifestyle. The appellant was often left alone to look after her younger siblings. Her stepfather was gaoled and her mother then entered into a third relationship. The new stepfather was physically and mentally abusive towards the appellant and also sexually abused her. When she was about 15 years of age, the appellant was sexually assaulted by three men and, as a consequence, her stepfather ordered her to leave the home.

[11] The appellant did not return to the family home until her mother and stepfather moved to Alice Springs. In the meantime, she had begun using cannabis, alcohol and other drugs. At the age of 17, she entered into a relationship from which two children were born. Her partner was physically abusive. At about the age of 27 years, the appellant began gambling.

Eventually the appellant and her partner separated as a consequence of her gambling and he cared for the children.

[12] In 2008, the appellant moved back to Alice Springs to where her mother was in charge of staffing at Calvary. It was through her mother that she obtained employment with that organisation.

[13] The court received a report from a consulting psychiatrist which recorded that the appellant was "disgusted" by what she had done and was deeply remorseful. While on remand she had been undertaking counselling sessions in relation to emotional issues and her problems with drinking and gambling. The psychiatrist reported that the appellant had experienced severe chronic emotional trauma leading to "psychological pain, depression and a level of despair". The gambling, whilst classified as an addiction, did not constitute a mental illness. It became a pattern of behaviour. At the time of sentencing, it was noted that the appellant's gambling had "largely been curtailed".

[14] The learned sentencing judge observed that the offending "must be ranked towards the top end of the scale of relative seriousness of crimes of this type". His Honour said:

> Quite apart from the very large amount of money stolen, your conduct involved an appalling breach of trust in relation to a vulnerable old lady who was in your care. Not only did you steal virtually the whole of her life savings, but also there is no realistic prospect of the monies being recovered in the main, the proceeds of your criminal activities were frittered away in gambling.

[15] His Honour observed that the offending was not the product of a sudden, impulsive and opportunistic succumbing to temptation but, rather, was a deliberate and calculated course of conduct over a lengthy period. His Honour conducted a detailed review of the submissions put before the court and concluded that the appellant had some prospects for rehabilitation provided she continued with appropriate counselling but noted that it would be "likely to be a long, hard road".

[16] His Honour indicated that he would have imposed a sentence of imprisonment for eight years but reduced that sentence to 6 years to reflect the discount provided for the plea of guilty entered by the appellant. A non-parole period of four years was set.

**Manifest excess**

[17] The first ground of appeal is that the head sentence of imprisonment for six years with a non-parole period of four years is manifestly excessive in all the circumstances of the offending and of the appellant.

[18] The principles applicable to such an appeal are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly

assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, excessive.[1]

[19] The appellant submitted that, when compared with sentences imposed in comparable cases, the sentence in this case was so excessive as to indicate error arising from a failure by the sentencing judge to correctly apply the relevant legal principles. The appellant provided to the Court a schedule of sentences in relation to offences in which the offender stole an amount of approximately $100,000 or more from an employer. It was submitted that the appellant's head sentence and non-parole period were manifestly more severe than sentences imposed for offending involving similar or greater amounts. Reference was made to the observations of the Court of Criminal Appeal in *R v Bird*[2] where it was said:

> The matters to be taken into account and the approach in this jurisdiction to sentencing for offences involving breach of trust by employees are reasonably clear, but may conveniently be restated. In general, lest the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the most usual and expected punishment in such cases. The sentence, and that part of it which is directed to be served, must be sufficiently substantial to indicate to the public the gravity of the particular offence. While the amount of money taken is not the only determinant of the length of sentence, it is a useful practical

[1] *Liddy v R* (2005) NTCCA 4 at [12] per Riley J.
[2] (1988) 56 NTR 17 at 33 per Asche CJ, Kearney and Rice JJ.

> indicator. Where very large sums of money are taken, as here, a lengthy sentence of imprisonment is warranted. Other factors being equal, like defalcations should be dealt with by like sentences and more serious defalcations by heavy penalties; this satisfies the need for consistency in punishment … .

[20] The appellant complained that, although the amount stolen was towards the lower end of the range pursuant to s 210(2) of the *Criminal Code 1983* (NT) (which refers to a sum of $100,000 or more), the sentencing judge characterised the offending as "towards the top end of the scale of relative seriousness of crimes of this type" and "amongst the most serious instances of its general type". In this regard, the appellant conceded that the offending was made more serious by the circumstances of the victim which included her age, vulnerability, frailty and the harm caused to her. However, the appellant submitted that the harm must be viewed in light of the fact that the victim went into a nursing home shortly after the offending and died four months later. It was contended that the characterisation of the offending as being in "the most serious" category over emphasised the harm and loss suffered.

[21] Reference to the reasons for decision in *R v Bird*[3] makes it clear that the amount of money taken is not the only determinant of the length of sentence. Whilst the quantum is an important factor to be considered, it remains but one factor along with all relevant considerations. Those factors include the matters set out in the *Sentencing Act 1995* (NT).

[3] (1988) 56 NTR 17 at 33.

[22] There can be no dispute that the offending in this matter was serious. The appellant stole a substantial sum of money. The theft was made all the more serious by the following circumstances:

(a) the victim of the offending was an elderly woman who was significantly dependent upon the appellant, the breach of trust in this case was particularly grave;
(b) the money stolen constituted almost the entirety of the victim's life savings;
(c) the impact upon the victim was substantial;
(d) the offending involved a considered course of conduct on the part of the appellant, it was not spur of the moment or opportunistic;
(e) the offending went on for a substantial period of time and the appellant had ample opportunity to consider her conduct and refrain from further offending;
(f) the funds were principally used for gambling and when the source of those gambling funds ceased the appellant only gambled "on and off" indicating that the need to gamble was not overwhelming, she was not an out-of-control gambler;
(g) winnings received from gambling with the victim's money were not repaid to the victim's account but rather into the appellant's personal account;
(h) the appellant did not gamble with her own money;

(i) the appellant did not disclose her offending but left the Northern Territory; and

(j) none of the losses will be recouped.

[23] The appellant placed before this Court a number of cases said to be of a similar kind with a range of sentences which were relied upon to indicate that the sentence of the appellant was manifestly excessive. It is of interest to note that the victims in most of those cases were governments, commercial corporations, small businesses and community groups. The impact upon those complainants of the theft of their funds was no doubt of great significance. In some of those cases, the impact upon the individuals behind or associated with the commercial entities was severe. In the present case the impact upon the victim was of a very high order.

[24] The description of the offending by the sentencing judge as "amongst the most serious instances of its general type" and "towards the top end of the scale of relative seriousness of crimes of this type" was, in our opinion, unexceptional. Those comments must be read in the context of other offences with similar characteristics or, as his Honour said, of the "general type".

[25] Nonetheless, in our opinion, the sentence is manifestly excessive. Reference to the many cases referred to by each of the parties makes it plain that this sentence is manifestly more severe than sentences imposed for other offences of its kind. Whilst the circumstances of the victim in this case were

an aggravating factor, in other respects the offending was similar to many cases of breach of trust.

[26] We would grant leave to appeal and allow the appeal. It is not necessary to address the other grounds of appeal.

**Resentence**

[27] In our opinion, an appropriate starting point in the circumstances of this matter is a sentence of imprisonment for six years. After allowing an appropriate discount for the plea of guilty, we would impose a sentence of imprisonment of four years and six months with a non-parole period of two years and six months. The sentence should commence from 8 December 2013.

**Hiley J:**

[28] I agree that the sentence was stern but not that it was manifestly excessive.

[29] I acknowledge that most of the other sentences for stealing a similar amount of money have ranged between three years and four and a half years imprisonment, and that those matters which have involved a sentence of about six years or more have involved a higher amount of money. Those amounts have ranged from $215,000 (seven years for a person with an extensive criminal history)[4] to $2.5M (seven years for money stolen over 10 years under duress to support a partner's drug habit).[5]

[4] *R v Payne*, Sentencing Remarks, NTSC, SCC 20921024, 11 June 2010.
[5] *R v Weinert*, Sentencing Remarks, NTSC, SCC 20326339 6 July 2004.

[30] Although the amount of money involved is a relevant factor,[6] there are two important aspects that distinguish those cases from the present matter.

[31] First, none of those cases were truly comparable cases when one considers the kind of victim involved. They related to thefts from employers, government bodies, commercial corporations, small businesses and community groups. Counsel were not able to identify any other cases in this jurisdiction that concerned a carer stealing a substantial amount of money from an elderly person who was dependent upon the carer to look after her personal and financial affairs. I regard this kind of theft, namely from an elderly vulnerable woman who has placed her trust in her carer, as more serious than a theft from an employer or commercial institution. Further, one would expect that the emotional effect upon such a victim would normally be greater than upon an employer particularly a government or commercial enterprise.

[32] Second, the amount of money stolen, even if it is lower in fact than that involved in those other cases where penalties in the range of six years or more were imposed, was significant in the present context. The theft resulted in the victim losing virtually all of her life savings, and with little or no prospect of recovery, for example through an insurance claim.

[33] Further, the appellant would have been well aware that this was the effect of her actions. She had full access to the victim's bank account and would

[6] Cf *R v Bird* (1998) 56 NTR 17 at 33.

have known that her unlawful withdrawals reduced the balance to the $4000 or so that was left. On the 134 occasions over the period between 12 December 2008 and 2 February 2010 when she withdrew money from the victim's bank account, frequently $1000 on a daily basis, she would have been aware of the effect that her actions were having on the victim's financial situation.

[34] I do, however, agree that the non-parole period was manifestly excessive. Whilst I acknowledge that it "should not be assumed in any way that the minimum period pursuant to [s 54 of] the *Sentencing Act* is to apply in the ordinary course of events"[7], I do not consider that there were any circumstances that suggested that the appellant should not be able to apply for parole after she had served 50% of her imprisonment term. In particular, she was a first offender and was remorseful and there was nothing to suggest that her prospects of rehabilitation were not good. I would have fixed her non-parole period as three years.

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[7] *Bishop v The Queen* [1997] NTCCA 105 at 13 per Martin CJ, Kearney and Bailey JJ.